

DISTRICT DEPARTMENT OF THE ENVIRONMENT

NOTICE OF PROPOSED RULEMAKING

Regulations on Retail Establishment Carryout Bags

The Director of the District Department of the Environment (“DDOE”), in accordance with the authority set forth in section 107(4) of the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code §§ 8-151.01 *et seq.*), section 5(a) of the Anacostia River Clean Up and Protection Act of 2009 (the “Act”), effective September 23, 2009 (D.C. Law 18-55; D.C. Official Code § 2-1226.51 *et seq.*), Mayor’s Order 2006-61, dated June 14, 2006, and Mayor’s Order 2010-27, dated February 1, 2010, hereby gives notice of the intent to adopt the proposed rulemaking to add a new Chapter 10, entitled Retail Establishment Carryout Bags, to Title 21 of the District of Columbia Municipal Regulations (DCMR).

This proposed new chapter implements the provisions of the Act, which mandate that retail establishments charge a fee of five cents (\$0.05) for each disposable carryout bag provided to a customer, mandate the material and labeling requirements of disposable carryout bags, authorize the retail establish to retain a portion of the fee charged for each bag, and allow the retail establishment to provide credit to customers who provide their own carryout bags to package their purchases.

The proposed regulations explain how DDOE will implement and enforce the requirements of the Act. While the proposed regulations closely track the language of the Act, certain provisions of the Act required further explication, and the regulations set forth how DDOE intends to implement and enforce the Act. These proposed regulations do not set forth the procedures through which the Office of Tax and Revenue, or the Department of Motor Vehicles will implement and enforce requirements of the Act that are within their jurisdictions.

For example, in Section 1001, DDOE sets forth the conditions under which the carryout bag fee must be charged. DDOE received numerous inquiries as to whether the Act required that the fee be charged for the purchase of food, if the food order is placed over the telephone or through the internet. Although the Act’s definition of “disposable carryout bag” references the provision of the bag at the “point of sale” (see the lead-in text of Section 2(1) of the Act), the Act’s fee provision states that the obligation to pay the fee arises “at the time of purchase” (see Section (4)(a)(1) of the Act). Section 1001 also sets forth DDOE’s interpretation that the fee is associated with the purchase, whether or not the time of purchase coincides with the time that the bag and food are provided to the customer. Therefore, the regulation requires that the fee be charged for orders placed by telephone, over the internet, and by facsimile, as well as in-person orders.

Section 1003 of the proposed regulations identifies the retail establishments to which the requirements of the Act apply. This section sets forth DDOE’s understanding that any retail establishment that is required to obtain a Public Health: Food Establishment Retail endorsement to their basic business license under Chapter 28 of Title 47 of the D.C. Official Code is subject to

the requirements of the Act. Accordingly, DDOE interprets the Act as meaning that businesses such as department stores and office supply stores, whose primary purpose is the sale of merchandise other than food, are nevertheless subject to the Act's requirements, if they also sell food items for which they are required to obtain a Public Health: Food Establishment Retail endorsement. In addition, Section 3(b) of the Act permits plastic and paper disposable carryout bags meeting certain criteria to be sold in the District. Section 1002 of the regulations makes clear that biodegradable and compostable bags are subject to these criteria.

Section 1006 of the proposed regulations identifies specific carryout bags that are not subject to the provisions of the Act. This section includes DDOE's interpretation of Section 2(1)(D) of the Act, which exempts "[p]aper carryout bags that restaurants... provide to customers to take food away from the retail establishment" from the Act. The proposed regulations therefore exempt from the application of the regulations paper carryout bags provided to customers to take food away from restaurants with seating, including both paper bags provided to the customer at purchase, such as carryout bags from fast-food restaurants, and bags provided to a customer to carry out a remaining portion of a meal that was otherwise consumed at the restaurant, commonly referred to as "doggy bags". In addition, the proposed regulations allow for the inclusion of incidental non-food items to be included in the bag (such as utensils or napkins, or small toys, for which there is no separate charge), without subjecting the provision of the bag to the requirements of the Act or the regulations. By contrast, the proposed regulations state that a paper bag provided by such a restaurant to a customer to carry out a non-food item (such as a compact disc or book) is subject to the requirements of the Act, and the regulations.

DDOE sets forth in Section 1008 of the proposed regulations an element of its interpretation of Section 4(b)(1)(B)(i) of the Act, which requires retail establishments that participate in the Carryout Bag Credit Program, to give a five cent (\$0.05) credit "for each carryout bag provided by the consumer for packaging their purchases, regardless of whether that bag is paper, plastic, or reusable." The regulations set forth that a retail establishment participating in the Carryout Bag Credit Program is not required to provide a credit to customers who decline a bag for packaging their purchases.

Section 1011 of the proposed regulations sets forth DDOE's interpretation that Section 3(a) of the Act (which provides that "[d]isposable carryout bags made of plastic that cannot be recycled shall not be sold or distributed, retail or wholesale, in the District") bans the sale in the District of non-recyclable plastic bags when sold by a retail establishment or sold to a retail establishment.

Lastly, in addition to receiving specific comments on the proposed regulations, DDOE is inviting comments on the possible creation of a hardship exemption for certain types of retail establishments. The comments should include the rationale for why a particular type of retail establishment should receive an exemption, the objective criteria that should be used to qualify for the exemption, a list of specific provisions in statutes or regulations that would require amendment to establish the exemption, and an explanation of why such an exemption would not frustrate the overall intent of the Act.

All persons desiring to comment on DDOE's proposed regulations should file comments in writing not later than (30) days after the publication of this notice in the *D.C. Register*.

Comments should be labeled “Review of the Retail Establishment Carryout Bag Regulations” and filed with the District Department of the Environment, Water Quality Division, 51 N Street, N. E., 6th Floor, (if filed before February 19, 2010) or 1200 1st Street, 7th Floor (if filed after February 19, 2010), Washington D.C. 20002, Attention: MaryLynn Wilhere, or by e-mail to marylynn.wilhere@dc.gov.

Title 21 DCMR is amended by adding a new Chapter 10, entitled Retail Establishment Carryout Bags, to read as follows:

CHAPTER 10: RETAIL ESTABLISHMENT CARRYOUT BAGS

1000 PURPOSE

The purpose of this chapter is to implement the provisions of the Anacostia River Clean Up and Protection Act of 2009, effective September 23, 2009 (D.C. Law 18-55; D.C. Official Code § 2-1226.51 *et seq.*).

1001 DISPOSABLE CARRYOUT BAG FEE REQUIREMENT

- 1001.1 Except as provided in Section 1006, a retail establishment shall charge each customer making a purchase from the establishment a fee of five cents (\$0.05) for each disposable carryout bag provided to the customer with the purchase.
- 1001.2 The fee imposed by Section 1001.1 shall be charged to a customer making a purchase whether the purchase is in person, through the internet, by telephone, by facsimile, electronically, or by any other means.
- 1001.3 The retail establishment shall indicate on the customer transaction receipt the number of disposable carryout bags provided, and the total amount of the fee charged.

1002 DISPOSABLE CARRYOUT BAG MATERIAL AND LABELING REQUIREMENTS

- 1002.1 Starting on April 1, 2010, each disposable carryout bag provided by a retail establishment shall meet the following requirements:
 - (a) All paper and plastic disposable carryout bags provided shall be one hundred percent (100%) recyclable;
 - (b) All paper and plastic disposable carryout bags shall display in a highly visible manner the phrase “Please Recycle This Bag”, or a substantially similar phrase. The lettering of the phrase shall meet the following requirements:
 - (1) The lettering of the phrase shall be at least one half of an inch (0.5”) in height or at least seventy-five percent (75%) of the width of the front panel of the bag;

(2) The lettering of the recycling statement shall appear on the exterior of either the front or back panel of the bag, and not on a gusset or the base of the bag; and

(3) The lettering of the recycling statement shall be in a boldface font.

(c) A disposable carryout bag made of paper shall contain a minimum of forty percent (40%) post-consumer recycled content; and

(d) A disposable carryout bag made of plastic shall be made of high-density polyethylene film marked with the SPI resin identification code 2, or low-density polyethylene film marked with the SPI resin identification code 4.

1002.2 A disposable carryout bag shall meet the requirements of this section, even if the bag is biodegradable or compostable.

1002.3 A disposable carryout bag made of both plastic and paper shall meet the paper carryout bag requirements of this section for the paper components of the bag, and shall meet the plastic carryout requirements of this section for the plastic components of the bag.

1003 RETAIL ESTABLISHMENTS SUBJECT TO CARRYOUT BAG REQUIREMENTS

1003.1 For the purposes of this chapter, the term “retail establishment” means:

(a) Any business required to have a Public Health: Food Establishment Retail endorsement to a basic business license pursuant to D.C. Official Code § 47-2827; and

(b) Any business required to have an off-premises retailer’s license, class A or B, pursuant to D.C. Official Code § 25-112.

1003.2 Such retail establishments include, but are not limited to, the following types of business:

(a) Bakeries;

(b) Delicatessens;

(c) Grocery stores;

(d) Convenience stores that sell food;

(e) Restaurants (subject to the exception set forth in section 1006);

- (f) Food vendors;
- (g) Street vendors that sell food;
- (h) Liquor stores; and
- (i) Any business that sells food items, whether or not the principal purpose of the business is to sell food items, including a department store or electronics store that has a Public Health: Food Establishment Retail endorsement to its basic business license.

1004 APPLICATION OF CARRYOUT BAG REQUIREMENTS TO RETAIL ESTABLISHMENTS SELLING BOTH FOOD AND NON-FOOD ITEMS

- 1004.1 The disposable carryout bag fee, and material and labeling requirements of this chapter, shall apply to a disposable carryout bag provided with the purchase of any item from by a retail establishment subject to this chapter, even if the item is a non-food item.

1005 APPLICATION OF CARRYOUT BAG REQUIREMENTS TO RESTAURANTS

- 1005.1 A restaurant with seating, as described in D.C. Official Code § 47-2827(e)(2), shall comply with the fee, and material and labeling requirements of Sections 1001 and 1002, for each of the following disposable carryout bags provided to a customer to take food away from the restaurant:

- (a) A plastic carryout bag;
- (b) A paper carryout bag, if:
 - (1) The bag includes a non-food item, whether or not the bag also contains a food item; and
 - (2) The restaurant directly charges the customer for the non-food item.

- 1005.2 A retail establishment where food is prepared and sold only for consumption off the premises, such as a delicatessen without seating or a carry-out establishment, that does not qualify as a restaurant under D.C. Official Code § 47-2827(e)(2), shall comply with the fee, and material and labeling requirements of Sections 1001 and 1002, for all paper and plastic disposable carryout bags provided to a customer with his or her purchase.

1006 CARRYOUT BAGS NOT SUBJECT TO THIS CHAPTER

- 1006.1 For the purposes of this Chapter, the term “disposable carryout bag” shall not include:

- (a) A bag used by a customer inside stores to package bulk items, such as fruit, vegetables, nuts, grains, or candy;
- (b) A bag used by a customer inside a store to contain or wrap frozen foods, meat, or fish, whether or not the items are prepackaged;
- (c) A bag used by a customer inside a store to contain or wrap flowers, potted plants, or other items where dampness may be a problem;
- (d) A bag used by a customer inside a store to contain unwrapped prepared foods or bakery goods;
- (e) A bag used by a customer by a pharmacist to contain prescription drugs;
- (f) A newspaper bag, door-hanger bag, laundry-dry cleaning bag, or bags sold in a package intended for use as garbage, pet waste, or yard waste bags;
- (g) A bag provided to a customer by the retail establishment for the purpose of transporting a partially consumed bottle of wine, as required by D.C. Official Code § 25-113(b)(5)(C);
- (h) A paper carryout bag provided to a customer to take food away from a restaurant with seating, as described in D.C. Official Code § 47-2827(e)(2), if the bag contains only:
 - (1) Food items; or
 - (2) Food and non-food items that the restaurant does not directly charge the customer for; and
- (i) A reusable carryout bag, as defined in Section 1099.

1007 RETENTION AND REMITTANCE OF THE CARRYOUT BAG FEE

1007.1 Except as provided in Section 1008, a retail establishment shall retain one cent (\$0.01) of each fee of five cents (\$0.05) charged pursuant to section 1001 and shall remit the remaining four cents (\$0.04) of each fee of five cents (\$0.05) charged pursuant to section 1001 to the Office of Tax and Revenue.

1008 CARRYOUT BAG CREDIT PROGRAM

1008.1 If a retail establishment participates in the voluntary Carryout Bag Credit Program, the establishment may retain an additional one cent (\$0.01), for a total of two cents (\$0.02), from each fee of five cents (\$0.05) charged pursuant to Section 1001. The remaining three cents (\$0.03) of each fee of five cents (\$0.05) charged pursuant to

Section 1001, shall be remitted to the Office of Tax and Revenue.

- 1008.2 The voluntary Carryout Bag Credit Program means a program under which the retail establishment:
- (a) Credits the customer at least five cents (\$0.05) for each carryout bag provided by the customer for packaging his or her purchases, regardless of whether the bag is paper, plastic, or reusable;
 - (b) Prominently advertises its participation in, and the substance of, the Carryout Bag Credit Program at each of its checkout registers;
 - (c) Reflects the total credit amount on the receipt of the customer who provides his or her own bag or bags; and
 - (d) Registers its participation in the Carryout Bag Credit Program with the District Department of the Environment.
- 1008.3 A retail establishment shall not be required, as a prerequisite to participating in the Carryout Bag Credit Program, to provide a credit to a customer for any portion of the customer's purchase for which the customer declines the use of a carryout bag.
- 1008.4 The retail establishment shall credit a customer a total number of five cent (\$0.05) credits that reasonably relate the amount of goods purchased to the number of carryout bags reasonably required to carry the purchased goods.
- 1008.5 A credit provided to a customer pursuant to a Carryout Bag Credit Program shall not reduce the amount of fees due to the Office of Tax and Revenue under Sections 1007.1 and 1008.1.
- 1008.6 A retail establishment that withdraws from the Carryout Bag Credit Program shall provide notice to the District Department of the Environment of its withdrawal at least ten (10) business days before its withdrawal.

1009 TAX STATUS OF FEES RETAINED BY RETAIL ESTABLISHMENT

- 1009.1 The fees retained by a retail establishment under this Chapter shall not be classified as revenue and shall be tax-exempt for the purposes of Chapters 18, 20, and 27B of Title 47 of the District of Columbia Official Code.
- 1009.2 The fees retained by the retail establishment under this section shall be excluded from the definition of a retail sale under D.C. Official Code § 47-2001(n)(2) and from the definition of gross receipts under D.C. Official Code § 47-2761(5).

1009.3 The fees to be remitted to the District under Sections 1007.1 and 1008.1 shall be added to other tax payments in determining whether the electronic payment requirement under D.C. Official Code § 47-4402(c) applies.

1010 PROHIBITION ON CERTAIN FEE-RELATED PRACTICES

1010.1 A retail establishment shall not assume or absorb, or refund to the customer, the disposable carryout bag fee.

1010.2 A retail establishment shall not advertise or hold out or state to the public or to a customer, directly or indirectly, that the reimbursement of the disposable carryout bag fee or any part of the fee to be collected by the retail establishment will be assumed or absorbed by the retail establishment or refunded to the customer.

1011 PROHIBITION ON SALE AND DISTRIBUTION OF CERTAIN DISPOSABLE CARRYOUT BAGS

1011.1 Disposable carryout bags made of plastic that is not one hundred percent (100%) recyclable shall not be sold or distributed, retail or wholesale, in the District.

1011.2 The prohibition set forth in this section applies to all disposable carryout bags sold or distributed, retail or wholesale, to or by any establishment in the District, whether or not the establishment is a retail establishment.

1012 PENALTIES FOR VIOLATIONS

1012.1 Violation of any of the requirements of this chapter, except for Sections 1007, 1008.1, 1008.5, and 1009, shall subject a retail establishment to the penalties set forth in this Chapter.

1012.2 If the Director of the District Department of the Environment (“Director”) determines that a violation of this chapter covered by subsection 1012.1 has occurred, the Director shall issue a warning notice to the retail establishment for the initial violation.

1012.3 If the Director determines that an additional violation of this chapter has occurred after a warning notice has been issued for an initial violation, the Director shall issue a notice of infraction and shall impose a penalty against the retail establishment.

1012.4 The penalty imposed by the Director shall not exceed the following, for each violation that occurs after the issuance of the warning notice:

- (a) One hundred dollars (\$100) for the first violation in a calendar year;
- (b) Two hundred dollars (\$200) for the second violation in a calendar year; and

- (c) Five hundred dollars (\$500) for the third and each subsequent violation in a calendar year.
- 1012.5 No more than one (1) penalty shall be imposed upon a retail establishment within a seven (7) calendar day period.
- 1012.6 A retail establishment shall have fifteen (15) calendar days after the date that a notice of infraction is issued to pay the penalty.
- 1012.7 The penalty shall double after fifteen (15) calendars days if the retail establishment:
 - (a) Does not pay the penalty; or
 - (b) Fails to respond to a notice of infraction by either denying or objecting in writing to the infraction or penalty.
- 1012.8 A recipient may request a hearing pursuant to instructions contained in the notice of infraction.
- 1012.9 Hearings or adjudications of violations under this Chapter shall be conducted pursuant to the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code §§ 2-1831.01 *et seq.*).

1099 DEFINITIONS

When used in this Chapter, the following words and phrases shall have the meanings ascribed:

100 percent (100%) recyclable - capable of being collected, separated, and recovered from the solid waste stream through the District's recycling programs, and either used again or reused in the manufacture or assembly of another package or product.

Act - means the Anacostia River Clean Up and Protection Act of 2009, effective September 23, 2009 (D.C. Law 18- 0055; D.C. Official Code § 2-1226.51 *et seq.*).

Disposable carryout bag - a bag of any material, commonly plastic or kraft paper, which is provided to a customer at the point of sale to carry purchases.

Post-consumer recycled content - any material that has completed its use as a consumer item and that would otherwise have been disposed of as municipal solid waste, but that has instead been reused or reconstituted as a product or raw material.

Reusable carryout bag - a bag with handles that is specifically designed and manufactured for multiple reuse and is made of cloth, fiber, other machine-washable fabric, or durable plastic that is at least two and one-quarter millimeters (2.25 mm) thick.